IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-929

HOLLIS O. BLACK — APPELLANT

v.

WILLIAM E. PAYNE, EXECUTIVE OFFICER, PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ET AL., — RESPONDENTS

On Appeal From the Court of Appeal of the State of California, Third Appellate District

JURISDICTIONAL STATEMENT

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WILLIAM E. PAYNE, EXECUTIVE OFFICER, PUBLIC EMPLOYEES' RETIREMENT SYSTEM; PUBLIC EMPLOYEES' RETIREMENT SYSTEM; AND BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

RESPONDENTS

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the Court of Appeal of the State of California, Third Appellate District ("Court of Appeal") was or-

dered by the court not to be published in the official reports. A copy is attached as Appendix A. The basis of its opinion cited by the court is Miller v. State of California, 18 Cal.3d 808 (1977), which also is reported in 135 Cal.Rptr. 386 and 557 P.2d 970.

Grounds on Which Jurisdiction of This Court is Invoked

(i) This action was instituted by appellant against the respondents, Public Employees' Retirement System (PERS), its Executive Officer, and Board of Administration, et al., on November 1, 1973 in the Superior Court of the State of California in and for the County of Sacramento under §§3281 and 3300 of the California Civil Code, §10, Article I of the United States Constitution, and §16, Article I of the California Constitution, for consequential damages for mandatorily retir-

ing appellant at age 69 pursuant to §38 of SB 249 (Chapter 170), enacted by the California Legislature effective July 1, 1971, in disregard of his vested contractual right not to be required to retire until age 70, and in violation of the contract clauses of the California and United States Constitutions (CT 1, pp. 1-9).[1/]

Thereafter appellant filed motion to consolidate said action, Case No. 240526, with Case No. 219859, a class action pending in the same court previously filed by appellant, for himself, and on behalf of a class of persons similarly situated, against substantially the same respondents, the two actions involving common questions of law and fact and

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1/ "CT 1, p. __, and CT 2, p. __," refer to Vols. 1 and 2 of the Clerk's Transcript.

and each arising out of the same transaction, namely, SB 249 (Chapter 170) above mentioned, §38 of which purports to lower the mandatory retirement age of members of PERS, in steps, from 70-67. Respondents objected to consolidation and said motion is still pending in the trial court (CT 1, pp. 10-13).

(ii) The Court of Appeal on July 29, 1977 filed its order affirming the judgment entered after the trial court granted respondents' motion for judgment on the pleadings. On August 19, 1977 the court denied appellant's petition for rehearing. On September 28, 1977 the Supreme Court of California denied appellant's petition for hearing in this action, following which on September 30, 1977 said Court of Appeal entered final judgment affirming said judgment of the trial court.

(iii) The statutory provision conferring jurisdiction on this Court for this appeal is 28 USC §1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

Atlantic Coast Line R. Co. v. Goldsboro
232 US 548, 34 S. Ct. 364, 58 L.Ed.721

Columbia R. Gas & Elec. Co. v. South Carolina
261 US 164, 43 S. Ct. 306, 67 L.Ed.620

Detroit United Ry. v. Michigan
242 US 238, 37 S. Ct. 87, 61 L.Ed. 268

Given v. Wright
117 US 648, 6 S. Ct. 907, 29 L.Ed. 1021

Houston, etc. R. Co. v. Texas (1900)
177 US 66, 20 S. Ct. 545, 44 L.Ed. 673

General Oil Co. v. Crain (1908)
209 US 211, 52 L.Ed. 754

Louisiana R. etc., Co. v. New Orleans
235 US 164, 35 S. Ct. 62, 59 L.Ed. 175

Indiana ex rel Anderson v. Brand
303 US 95, 82 L.Ed. 685, 58 S. Ct. 443,
113 ALR 1482

(v) The validity of §38 of SB 249 (Chapter 170), enacted by the California Legislature effective July 1, 1977 is here involved. The pertinent part of that section is as follows:

"SEC.38. Section 20981 of the Government Code is amended to read:

"20981. Every state miscellaneous member, school member and local miscellaneous member shall be retired on the first day of the calendar month succeeding that in which he attains age 70 if his 70th birthday occurs on or prior to September 30, 1971. Such members who have attained age 69 but not age 70 on September 30, 1971, shall be retired October 1, 1971, and those who attain age 69 in the period October 1, 1971, to September 30, 1972, inclusive, shall be retired on the first day of the calendar

month next succeeding that in which they attain age 69. Such members who have attained age 68 but not age 69 on September 30, 1972, shall be retired in October 1, 1972, and those who attain age 68 in the period October 1, 1972, to September 30, 1973, inclusive, shall be retired on the first day of the calendar month next succeeding that in which they attain age 68. Such members who have attained age 67 but not age 68 on September 30, 1973, shall be retired on October 1, 1973, and those who attain age 67 on or after October 1, 1973, shall be retired on the first day of the calendar month next succeeding that in which they attain age 67;". . .

Question Presented by this Appeal:

Whether Respondents impaired the obligation of Appellant's vested contractual right not to be mandatorily retired

until age 70 by mandatorily retiring him at age 69 pursuant to SB 249?

STATEMENT OF THE CASE

Appellant's complaint in pertinent part, as filed in the trial court against PERS, its Executive Officer, Board of Administration, et al., as reviewed by the Court of Appeal, and which the Supreme Court of California declined to review, reads as follows (CT 1, pp. 2,5):

"IV

"During all times mentioned herein plaintiff was and is a resident of the City of Sacramento, State of California. He became a member of PERS pursuant to §20303, Government Code, upon entry into employment on December 2, 1970 as Associate Counsel, Department of Consumers Affairs, whose principal office at all such times was and is maintained in the

City of Sacramento, State of California.

"V

"At the time plaintiff became a member of PERS the mandatory retirement age was age 70, and had been continuously since the Public Employees' Retirement Law was enacted in 1931. During all of said time said age 70 mandatory age had been and was a part of PERS' retirement plan and contract, and plaintiff relied upon this as a basis of accepting and continuing employment with his said public employer. Notwithstanding this, dedendant PERS on March 1, 1972 purported to mandatorily retire plaintiff at age 69 instead of at age 70, pursuant to SB 249 (Chapter 170) enacted by the California Legislature June 21, 1971 and effective July 1, 1971, and thereby to terminate his membership in PERS pursuant to

§20390(a), Government Code. As a consequence, plaintiff was prevented from continuing to perform service as Associate Attorney for and earning his salary from said Department of Consumers Affairs during the period March 1, 1972 until March 1, 1973, the first day of the month following the month in which he attained age 70. Plaintiff's total salary during said period normally would have been $17,655.00, and he alleges that defendant PERS' conduct aforesaid impaired the obligation of his contract, in violation of §16, Article I of the California Constitution and of §10, Article I of the United States Constitution."

Respondents' demurrer on the ground that the complaint does not state a cause of action was overruled, the court allowing 20 days to answer. Appellant's demur-

rer to the answer was overruled and his motion to strike was denied as to all affirmative defenses except the first (CT 1, pp.24-26). Appellant's motion for reconsideration was denied (CT 1, pp. 37-45.) His appeal to the Court of Appeal was dismissed on technical grounds and not heard on the merits.

Respondents on November 12, 1975 filed motion for judgment on the pleadings, which was set before a different judge. It was made on the single ground that the complaint fails to state facts sufficient to constitute a cause of action. One lone case was cited as authority, the then recent case of Townsend v. County of Los Angeles (1975) 49 Cal.App. 3d 263, 122 Cal.Rptr.500. Following submission of authorities by the parties, judgment was entered after the court had

granted defendants' said motion. The court's order did not provide for leave to appellant to amend (CT.2, pp.34-37.) On June 21, 1976 appellant filed Notice of Appeal (CT 2,p.39.) Following submission of briefs by appellant and a reply brief by respondents the Court of Appeal on July 29, 1977, by opinion ordered not to be published in the official reports, affirmed the judgment of the trial court (Appendix A.) Appellant's petition to the Supreme Court of California for a hearing in this action was denied (Appendix B), following which final judgment was entered by the Court of Appeal on September 30, 1977 affirming the judgment of the trial court entered after it had granted respondents' said motion for judgment on the pleadings.

Although appellant's action is one

for consequential damages for impairment of the obligation of his contract under the retirement law, the Court of Appeal states in its opinion that "For the reasons stated in Miller v. State of California (1977) 18 Cal.3d 808, plaintiff's complaint did not state a cause of action for impairment of a contractual right to continue employment until age 70. (Id., at pp. 811, 813, 814, 816-818.)" For the reasons that follow, we respectfully submit that this reference is irrelevent to the case at bench, as this is not an action involving tenure under the State Civil Service Law (§§18500, et seq.)[2/]

2/ Unless otherwise indicated, section numbers refer to the California Government Code.

Age 70 Mandatory Age is Part of
The Retirement Plan and Contract

In substance, appellant's complaint claims $17,695.00 as consequential damages, alleging that at the time he accepted employment as Associate Counsel, Department of Consumers Affairs, and became a member of PERS (§20303) the retirement plan and contract provided for duration of membership until retirement (§20390(a), that mandatory retirement for service was not required until age 70 (§20981) and had not been since the retirement law was enacted in 1931 and appellant relied upon this as a basis of accepting and continuing employment;[3/] that respondents impair-

3/ Attached to the complaint and incorporated therein by reference is copy of statutory claim filed with State Board alleging "At the time he entered employment..said §20981 specified age 70 as the compulsory retirement age and Claimant entered said employment and became a member of PERS with that understanding and relied upon it."

contract in violation of the contract clauses of the California and United States Constitutions by forcing him to retire for service pursuant to SB 249 (Chapter 170) enacted by the California Legislature effective July 1, 1971, at age 69, which said SB 249 purported to lower the mandatory retirement age of said retirement plan and contract, in steps, from 70-67. At the time he became a member of PERS, the retirement plan and contract also provided for (1) contricutions to the retirement fund by both appellant (§§20600, et seq.) and his public employer (§§20750, et seq.); Exclusive management, investment and control of the Retirement Fund by the Board of PERS (§20201); (3) Performance by appellant of "State service" for his public employer, "State service" being defined

as (§20801) "service rendered as an employee..of the State..for compensation,." (Emphasis supplied.) (4) Computation and accounting for such "State service" (§§ 20860, et seq.); (5) Retirement Benefits (§21251.1) including the member's (a) service retirement annuity, derived from his accumulated contributions at the time of retirement, and his (b) Current Service Pension, consisting of his service retirement annuity supplemented by his public employmer's contributions so as to equal the fraction of 1/60th of his compensation according to his age at the time of retirement, multiplied by the number of years of current service with which he is entitled to be credited at the time, "current service" being defined as "all state service rendered by a member on and after the date upon which he

first became a member,." (Emphasis supplied.) (6) §20181 of the Retirement Plan and Contract provides expressly:

"The obligations of this system to its members continue throughout their respective memberships, and the obligations of this system to and in respect to retired members continue throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged. The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue throughout the memberships of the respective members, and the obligations of the state and contracting parties to this system in respectto retired members formerly employ-

ed by them, respectively, continue until all of the obligations in respect to those retired members, respectively, have been discharged. The obligations of any member to this system continue throughout his membership, and thereafter until all of the obligations of this system to or in respect to him have been discharged.." (Emphasis supplied.)

The Retirement System (Plan) Constitutes the Contract

The Retirement Law sets forth the membership contract between the state and the member, one of the primary objectives of which is to induce competent persons to enter and remain in public employment. Kern v. City of Long Beach (1947) 29 C.2d 848, 856, 179 P.2d 799. It constitutes the pertinent "pension provisions" referred to in O'Dea v. Cook (1917), 176 Cal. 659, 661-662, quoted with approval in Kern, supra, (Id.,pp. 851-852)as follows:

"..But where, as here, services are rendered under a pension statute, the pension provisions become a part of the contemplated compensation for the services .." And those provisions do not limit the member's vested pension rights to the provisions it sets forth for pension "benefits"- the end product - as is indicated in Miller v. State of California, 18 C.3rd 808, 815.

In Indiana Ex Rel. Anderson v. Brand (1938), 82 L.Ed. 686, 690, this Court stated:

"As in most cases brought to this court under the commerce clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it.., it is established that a legislative enactment

may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Article I, §10." (Emphasis supplied.) See also Bilyeu v. State Employees' Retirement System (1962) 25 Cal.Rptr. 562, 375 P.2d 442; Kern v. City of Long Beach, supra.

Employment of PERS Member is Indispensable Incident of Plan and Membership and a Necessarily Implied Obligation of Public Employer

As stated in Kern, supra, one of the primary objectives of providing pensions for government employees is to induce competent persons to enter and remain in public employment. In line with this objective, the retirement law provides for membership in PERS upon entry into employment, duration of membership until

retirement and no compulsory retirement until age 70; mutual contributions to the retirement fund by the member and his public employer; performance of "State service" for his public employer, "State service" being expressly defined as service rendered as an employee of the state for compensation (§20801); and retirement benefits to the member based partly on the total amount of his contributions to the fund, but primarily on the number of years of "State service" he is credited with on retirement (§20804.)

It is obvious in view of the primary objective of the plan and its express provisions to implement the plan, that there would be no retirement plan, and no reason for having a retirement plan, except for the continuous state service that it spells-out and provides for bene-

fits to members for providing, according to the amount they provide - the longer they serve, the more they earn and are entitled to receive. In Volume One, Witkin Summary of California Law, CONTRACTS, p.490, §573, the following statement of the law is made: "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed excluded." (C.C. 1656.) (See Rest., Contracts §262; Farmers' etc. Bank v. Bailie (1934) 138 C.A. 143,149, 32 P.2d 157; Meinieri v. Magnuson (1954) 126 C.A.2d 426, 272 P.2d 557; Adkin v. Lear (1967) 67 C.2d 882,905, 64 C.R. 545, 435 P.2d 321; 3A Corbin §631; 5 Williston 3d §887 et seq.; 17 Am.Jur.2d

Contracts 255; 20 Am.Jur.2d, Covenants, Conditions and Restrictions 12.)

In Sacramento Nav. Co. v. Salz (1927) 273 U. S. 326, this Court, holding that a contract includes implied provisions indispensable to effectuate the intention of the parties, stated:

"..The bill of lading declares that the cargo was shipped on board the barge. But it was to be transported, and this the barge alone was incapable of doing since she had no power of self-movement. It results, necessarily, that it was within the contemplation of the contract that the transportation would be accomplished by combining the barge with a vessel having such power. Respondent says there was an implied contract to this effect; that is, as we understand, a distinct contract implied in fact.

But a contract includes, not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it is made. 3 Williston on Contracts, §1293; Brodie v. Cardiff Corporation (1919) A.C.337,358. And there is no justification here for going beyond the contract actually made to invoke the conception of an independent implied contract.

Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract, and the use of the tug must be read into the contract as an indispensable factor in the performance of its obligations. To transport

means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been as futile as a contract for the use of a freight car without a locomotive. In this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for, not by the barge, an inert thing, but by the barge and tug, constituting together the affirmative instrumentality to that end. (Emphasis supplied.)

The court in Miller erred in Failing To Consider State's Employment Obligation

Although the court in Kern v. City of Long Beach, supra, states that the nature and extent of the city's obligation must be ascertained from both the

language of the pension provisions and judicial construction of the provisions or similar legislation at the time the contractual relationship was established, it seems that the court in Miller, supra, in concluding that the state[3/] was under no obligation to continue the member's employment, gave no consideration to the language of the pension provisions setting forth the terms of the contract, in part expressed and in part necessarily resulting and implied from that which was expressed - the long-term rendition of state service by the member - a contract which manifestly would have been as futile without continuous state employment as a contract for the barge in Sacramento

3/"State" means the State and any other office, officer,...board,..or agency of the State claims against which are paid by warrant drawn by the Controller.(Sec. 900.6). (Emphasis supplied)

Nav. Co. v. Salz, supra, would have been without the tug. (Emphasis supplied.)

Since appellant's right not to be mandatorily retired and not to have the duration of his membership in PERS terminated until age 70, and since the state's obligation of employment along with the other obligations provided by PERS are continuous throughout his membership (§20108), we respectfully submit that the cases cited in and holding of Miller to the effect that public employment is not held by contract but by statute are wholly irrelevent and inapplicable to the case at bench, that SB 249 enacted by the Legislature impaired the obligation of appellant's contract, and that said SB 249 is repugnant to Article I, §10 of the United States Constitution.

THE QUESTION IS SUBSTANTIAL

This Court is not deprived of jurisdiction because the state court has put its decision on the ground that the contract, if one exists, was not made, or that it was invalid because allegedly it did not contain an express provision for continuous employment of appellant until age 70. In such cases, this Court must determine for itself (1) Whether there is an existing contract? (2) If so, what obligation arose from it? and (3) Has that obligation been impaired by subsequent legislation? Louisiana R. etc., Co. v. New Orleans (1914) 235 US 164, 35 S.Ct. 62, 59 L.Ed.175; Houston, etc.,R.Co. v. Tex. (1900) 177 US 66, 20 S.Ct. 545, 44 L.Ed. 673,680. See also Atlantic C.L.R. v. Goldsboro (1914) 232 US 548, 34 S.Ct. 364, 58 L.Ed. 721.

From the inception of this case and at all times and in all courts thereafter, appellant's complaint has drawn in question the validity of §38 of SB 249 and the authority exercised thereunder by respondents on the ground that same is repugnant to Article I, §10 of the United States Constitution. Inasmuch as it is appellant's right to be protected against a law which violates his constitutional right, the decision of the state court which denies him such protection gives effect to said §38 and is reviewable by this Court. General Oil Co. v. Crain (1908) 209 US 211, 52 L.Ed. 754.

Where, as in this case, it is charged that the obligation of contract has been impaired by a subsequent state law and, as here, the state court justifies such impairment by the application

of some general rule of law to the facts of the case, this Court has jurisdiction to review that decision. Given v.Wright, 117 US 648, 6 S.Ct. 907, 29 L.Ed. 1021. See also Columbia R. Gas & Elec. Co. v. South Carolina (1923) 261 US 164, 43 S. Ct. 306, 67 L.Ed. 620; Detroit United Ry. v. Michigan, 242 US 238, 37 S.Ct. 87, 61 L.Ed. 268.

Resolution of Question
Merits Plenary Consideration

This case was submitted on the pleadings and no evidence has been taken. However, on information and belief, appellant alleges that there are several thousands of former members of PERS who were affected and forced by SB 249 to retire prior to age 70 at ages 69, 68 and 67, respectively, and who - if appel-

lant's position is held to be correct - sustained losses in varying amounts depending upon the lengths of their respective services and the amounts of their respective salaries. While appellant does not have a break-down of their individual and total losses, the losses of plaintiff Miller reflected in Miller, supra, (18 Cal.3d 811-812) for pension benefits alone indicate that they were substantial. The Board of Administration of PERS fixed his pension at $1,863 per month on the basis of his forced retirement at age 67, whereas had he remained in his final position until age 70 and received salary increases as the Legislature provided, his retirement pension, based on the benefit factor in effect before SB 249, would have been at least $2,365 per month. As indicated above,

the amount of consequential damages for salary losses sustained by Miller is not reflected.

The court in Miller, supra, cited Townsend v. County of Los Angeles (1975) 49 Cal.App.3d 263, 267-268, 122 Cal.Rptr. 500, as one of the authorities establishing "these long and well settled principles." Townsend (p. 268) announces this statement of policy: "Conceptually, there should be no difference between a public agency's right to reduce the salary of a tenured employee and a public agency's right to require an employee to retire at a given age, thus forcing him to accept a pension that, in some cases, and, as plaintiff alleges in this case, effects a substantial reduction in income."4/ (Emphasis supplied).

4/This apparently was applied to plaintiff Miller.

The court in Townsend concluded its opinion (p.271) as follows: Doubtless many county employees, unlike plaintiff, have no complaints that they will receive a higher pension by retiring at age 65 than they would have received at age 70, and that the new system permits such employees an additional five years during which they may, besides receiving a pension, work or not work as they choose." (Emphasis supplied.) The amount of plaintiff Townsend's salary is stated as $466 a month (p. 267).

Apparently the court in Townsend, and the court in Miller in approving Townsend, failed to consider that where a legislative body having jurisdiction over pension rights has already enacted specific provisions on the subject, the public policy is established thereby.

McCarthy v. Oakland, 60 Cal.App.2d 546, 141 P.2d 4; and further failed to consider:

"A court cannot legislate, and any attempt on its part to do so is an invalid infringement on the legislative function. This limitation applies with particular force where by so doing the action of the court operates to deprive citizens of their vested rights, or impairs the obligations of contracts." Beckman v. Skaggs, 59 Cal. 541; Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674. (Emphasis supplied.)

The California Legislature has expressed its disapproval of the "policy" declaration of Townsend, approved by Miller. Assembly Bill No. 568 (Stats. 1977, ch.852), enacted as an urgency measure to take effect immediately, generally does

away with age mandated compulsory retirement where the employee wishes to continue work and the employer certifies him as being competent. Section one of the bill provides: "The Legislature of the State of California finds and declares that the use of chronological age as an indicator of ability to perform on the job and the practice of mandatory retirement from employment are obsolete and cruel practices. The downward trend toward involuntary retirement at ages from 55 years represents a highly undesirable development in the utilization of California's worker resources. In addition, this practice is now imposing serious stresses on our economy and in particular on pension systems and other income maintenance systems." (Emphasis supplied.)

(Emphasis supplied.)

There was No Lawful Termination of Employment; No Condition Subsequent

The court in Miller states (18 Cal. 3d 816-817) that plaintiff Miller's loss of pension benefits and additional salary based on state service until age 70 did not result from an impairment of his vested rights but from the occurrence of a condition subsequent to the accrual of those rights, "namely plaintiff's lawful termination from employment prior to the time when his right to full benefits would have matured." This would seem to contradict the court's previous statement (p.815,2d par.) to the effect that, at most, the only employment right the plaintiff had was on a month-to-month basis. But here, the court indicates that he had the unqualified right of employment until

age 70 and that the only thing that prevented it was a "condition subsequent" which the Legislature "created" (p. 817, last par.) In this statement the court also apparently overlooked the fact that this entire contract, spelled-out in PERS before SB 249, is the creature of the Legislature; that the subsequent alteration of that contract by the Legislature through the enactment of SB 249 impaired the obligation of that contract and that this result cannot be effaced by calling it a "Condition subsequent." Furthermore, if it were a "condition" it would not be one that just "happened" but as stated by the Miller court, would be one the Legislature "created". In this connection, the statement of the Ninth Circuit in Christensen v. Felton, 322 F.2d 323, 9 ALR 3d 499 at 506 appears apt: "As applied by

the referee in this case, the provision of the contract upon which the trustee relies would operate as a condition, and would have the effect of terminating the obligation of McDonnell Company and the rights of the appellee-creditors. It has long been good contract law that if the happening of such a condition is caused by the conduct of the promisor it will not terminate the duty of the promisor. (Restatement, Contracts §302 (1932) and cf. §307.) (Emphasis supplied.)

The "lawful termination of employment" as described by the court in Miller (p. 814),occurred as follows:

"In view of these long and well settled principles, we conclude that the power of the Legislature to reduce the tenure of plaintiff's civil service position and thereby to shorten his state ser-

vice, by changing the mandatory retirement age was not and could not be limited by any contractual obligation."

Thus, in effect, the court would appear to proceed from the premise that prior to the enactment of SB 249 the tenure of the plaintiff's civil service position continued until age 70, and that the only way the Legislature could shorten his state service without impairing a contractual obligation was by reducing the tenure of his civil service position.

But even assuming the Legislature would have the power under appropriate circumstances, in a proper way, to reduce such tenure, we submit that it had no more right to do so by changing the mandatory retirement age and thus preventing the plaintiff from continuing

to perform state service until age 70 than it would have to abolish the remedy applicable to an existing contract without enacting any reasonable substitute remedy (Poindexter v. Greenhow, 114 US 270, 5 S.Ct.903, 962, 29 L.Ed. 185.) The Constitution protects against not only a direct but an indirect impairment of a contractual obligation. Houston, etc. R. Co. v. Texas (1900) 177 US 66,77, 20 S. Ct. 545, 44 L.Ed. 673, 680.

In the second place, even assuming that the Legislature had such power, it did not exercise it. SB 249 only amended the retirement law. It did not change the State Civil Service Law (§§18500, et seq.,) and that law, which regulates tenure, does not contain any retirement provisions.

The only purpose for which retire-

ment is authorized by the retirement law is stated in §20001 as follows: "The purpose of this part is to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced.." (Emphasis supplied.) The type of retirement provided by §20981, as reflected by the caption of Article 2 of the chapter on "Retirement" is "Compulsory Retirement For Service."

§19500 of the State Civil Service Law provides for SEPARATIONS FROM SERVICE as follows: "Any such employee may be temporarily separated from the state civil service through layoff, leave of absence, or suspension, permanently separated through resignation or removal for cause, or permanently or temporarily

separated through retirement or terminated for medical reasons under the provisions of Section 19253.5." (Emphasis supplied.) Specific provisions are set forth relative to resignations in §19502, relative to Layoff and Demotion in Articles 2 and 2.5, and relative to Disciplinary Proceedings in Article 3, but no provisions whatever are set forth relative to Separations through Retirement. That provision, under these circumstances, appears to be absolutely inert and meaningless unless and until such time as the Retirement Board has already retired the member under the Retirement Law. But the retirement relevent here is a retirement from state service, not a retirement to reduce (terminate) the tenure of his civil service position.

Although the court proclaimed the Legislature's power, the only authority it cited as to how the above plan could be carried out without being "limited by any contractual obligation" is a general reference to the holding in Gilmore v. Personnel Board (1958) 161 Cal.App.2d 439, 448-449, 326 P.2d 874, to the effect that government officials may exercise such additional powers as are necessary for the due and efficient administration of the powers expressly granted, or as may fairly be implied from the statute granting the power.

However, public officers have only such power and authority as are clearly conferred by law or necessarily implied from the powers granted. City of Los Angeles v. Industrial Accident Commission, 8 Cal.App.2d 580, 47 P.2d 1096.

Although courts will go to all reasonable lengths in interpreting statutes conferring powers on officials of the state so that laws may be given effect and the ends of justice subserved, they cannot, by construction, confer on any officer an authority that the Legislature has seen fit to withhold. Sutro v. Pettit, 74 Cal. 322, 16 P. 17. (Emphasis supplied.)

For the foregoing reasons, it is also submitted that there is no basis for the court's position in Miller (p. 815) that a member's pension rights vest upon acceptance of employment only to pension benefits; and that there is no basis in fact or law for it to apply the constitutional method of modification outlined in Kern v. City of Long Beach, supra, Wallace v. Fresno (1954) 42 Cal.2d 180, 265 P.2d 884, and Allen v. City of

Long Beach (1955) 45 Cal.2d 128, 287 P.2d 765, and which the court in Miller discusses and rejects (pp. 816-817.)

CONCLUSION

For all of the foregoing reasons, appellant respectfully submits that the question presented herein is substantial and merits adjudication by this Court.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

(Sacramento)

HOLLIS O. BLACK Plaintiff and Appellant v. WILLIAM E. PAYNE, as Executive Officer, Public Employees' Retirement System, et al., Defendants and Respondents	3 Civil 16095 Super. Ct. No. 240526 FILED JUL 29 1977 COURT OF APPEAL: 3rd DISTRICT Wilfried J. Kramer, Clerk By_____ Deputy

BY THE COURT:

Plaintiff appeals from the judgment entered after the trial court granted defendants' motion for judgment on the pleadings.

The statement of the case in respondents' brief fairly summarizes the proceedings and is incorporated by reference herein.

For the reasons stated in Miller v. State of California (1977) 18 Cal.3d 808, plaintiff's complaint did not state a cause of action for impairment of a contractual right to continue employment until age 70. (Id., at pp. 811, 813, 814, 816-818.

The judgment is affirmed.

FOR THE COURT:

Puglia, P. J.

Friedman, J.

Janes, J.

APPENDIX B

Order Due
October 27, 1977

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL
3rd District, Division -- Civil No. 16095
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

BLACK
V.
PAYNE, etc. et al.

Appellant's Petition for Hearing DENIED.

SUPREME COURT
FILED
SEP 28, 1977
G. E. Bishel, Clerk
Deputy

/s/ BIRD
Chief Justice

APPENDIX C

FILED

DEC 13 1977

COURT OF APPEAL -
3RD DISTRICT

Wilfried J. Kramer, Clerk
By_____ Deputy

IN THE COURT OF APPEAL OF THE STATE

OF CALIFORNIA, THIRD APPELLATE DISTRICT

HOLLIS O. BLACK Plaintiff and Appellant vs. WILLIAM E. PAYNE, Executive Officer, Public Employees' Retirement System, et al., Defendants and Respondents	NO.3 Civil 16095

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Hollis O. Black, the plaintiff and appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, Third Appellate District, affirming a judgment entered after the trial court granted defendants' and

respondents' motion for judgment on the pleadings, said final judgment of said Court of Appeal of the State of California, Third Appellate District, being entered in this action on September 30, 1977 following the order of the Supreme Court of California on September 28, 1977 denying plaintiff's and appellant's petition for hearing in this action.

This appeal is taken pursuant to Title 28 USC §1257(2).

Dated: December 8, 1977

Hollis O. Black
Plaintiff and Appellant
Attorney for Plaintiff and Appellant

CERTIFICATION OF SERVICE

I, Hollis O. Black, attorney for plaintiff and appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 8,

1977 I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon defendants and respondents by mailing a copy, in a duly addressed envelope, postage prepaid, to the attorney of record of defendants and appellants, namely, Jeffrey L. Gunther, Esquire, Deputy Attorney General of the State of California, 555 Capitol Mall, Suite 350, Sacramento, California 95814.

Hollis O. Black

Hollis O. Black
Attorney for Plaintiff
and Appellant
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